

Ex. Capt. K. Balasubramanian and Others

Vs

State of Tamil Nadu and Anothers

Civil Appeal No. 2992 of 1986

(S. C. Agarwal, K. Jagannatha Shetty JJ)

14.03.1991

JUDGMENT

AGRAWAL, J. –

1. This appeal and the concerned petitions for special leave to appeal are directed against the common judgment of the Division Bench of the Madras High Court dated July 22, 1986 whereby the judgment of the learned Single Judge has been set aside and the writ petitions filed by the appellants as well as the petitioners in the special leave petitions (referred to as 'the petitioners' for the sake of convenience) have been dismissed.

2. The petitioners joined the Indian Army as Emergency Commissioned Officers (ECOs) in 1963 after the Chinese aggression. They were discharged from the Army during the years 1967 to 1970. After their discharge from the Army, they joined the Commercial Tax Service of the State of Tamil Nadu on being selected by the Tamil Nadu Public Service Commission through a competitive examination. For rehabilitation of ECOs/Short Service Regular Commissioned Officers (SSRCOs) on their release from the Armed Forces, the Government of Tamil Nadu had by G.O.Ms. No. 84 dated January 1, 1967, reserved 25 per cent of the vacancies to be filled by direct recruitment during the four years 1976-1970 in respect of certain categories of posts in the State services. By order, G.O.Ms. No. 686 dated March 24, 1970, the Government of Tamil Nadu, in modification of the said order reserved 25 per cent of the vacancies in non-technical posts under various groups (both gazetted and non-gazetted) to be filled by direct recruitment during five years commencing from 1969 for rehabilitation of ECOs/SSRCOs in their release from the Armed Forces. The said order made provision for relaxation of age in case of such officers for the purpose of recruitment to the reserved vacancies. As regards seniority provision was made in paragraph 8 of the said order which prescribed as under :

"Inter se seniority among the candidates selected for the reserved vacancies will be determined by the Commission. So far as the seniority in the department is concerned, the officers will take their seniority with reference to the order of preference indicated by the Commission and not with reference to the service with the Armed Forces."

3. It appears that in respect of doctors who had joined the defence forces in connection with the emergency declared in 1962 and who were subsequently appointed in the cadre of Assistant Surgeons in the State of Tamil Nadu, the government had issued an order G.O.Ms. No. 2020 dated September 23, 1965, whereby seniority of such an incumbent was to be fixed by allotting them year in which he would have been appointed to the post at his first possible attempt after the date of

joining military service/training. The Tamil Nadu Public Service Commission, in their letter dated February 6, 1973 addressed to the Chief Secretary to the Government of Tamil Nadu, made a reference to G.O.Ms. No. 2020 Health dated September 23, 1965 with regard to fixation of seniority of candidates appointed to the post of Assistant Surgeon against vacancies reserved for ECOs/SSRCOs and expressed the view that allowing one of released persons like doctors to enjoy the concession of their seniority being reckoned with reference to their date of appointment in the Army and at the same time denying such a concession to ECOs/SSRCOs selected to a non-technical post will not be fair and such differential treatment will not also be in the interests of rehabilitating released Army personnel. The Public Service Commission, therefor, commended that the principle followed in the matter of determining seniority in respect of released Army Doctors with reference to the date of their joining duty in the Armed Forces be extended to all services as recruitments to all the services are made on the basis of the competitive examinations comprising either of a written test or an oral test or a combination of both. In the said letter, it was requested that orders in paragraph 8 of G.O.Ms. No. 686 may be suitably modified. Keeping in view the aforesaid view expressed by the State Public Service Commission, the Government of Tamil Nadu passed on order G.O.Ms. No. 25 dated November 16, 1976 whereby, in supersession of the earlier procedure prescribed for determining the seniority of the ECOs/SSRCOs recruited for non-technical posts (both gazetted and non-gazetted) against reserved vacancies in G.O.Ms. No. 686 dated March 24, 1970, the following procedure was prescribed :

"(i) the seniority of the Emergency Commissioned/Short Service Regular Commissioned Officers recruited to the State Civil Services (both gazetted and non-gazetted) between March 24, 1970 to October 4, 1973 against reserved vacancies shall be fixed treating them as belonging to the year in which they would have been appointed to the posts in their first possible attempt after the date of joining military service/training."

4. After the issuance of the aforesaid order dated November 16, 1976, it was represented to the State Government that the concession granted to the ECOs/SSRCOs recruited to the Civil Services of the State between March 24, 1970 to October 4, 1973 in fixing seniority may be extended to all ECOs/SSRCOs recruited to the Civil Services of the State instead of confining it only to those recruited between 1970 and 1973. The State Government decided to accede to that request and issued a fresh G.O.Ms. No. 734 dated June 15, 1977 whereby the orders in para 1(i) of the order dated November 16, 1976 were thus modified :

"1. (i) The seniority of Emergency Commissioned Officers/Short Service Regular Commissioned Officers recruited to the non-technical posts against reserved vacancies shall be fixed treating them as belonging to the year in which they would have been appointed to the posts in their first possible attempt after the date of joining military duty. In the case of candidates who joined military service on or before June 30 of a year, the year of allotment would be the same; while in the case of those who joined the military service on or after July 1 of a year, the year of allotment would be the next year."

5. By the said order, it was also directed that the appointing authority should take steps to refix the seniority of the ECOs/SSRCOs recruited to the Civil Service with reference to instructions after issuing notices to all affected parties. In accordance with the aforesaid directions, notices were issued to the other officers whose seniority was likely to be disturbed in view of the concession extended to ECOs/SSRCOs under order dated June 15, 1977. After taking into consideration the

representations received in pursuance of the said the State notice, Government issued an Order G.O.Ms. No. 233 dated March 3, 1980 whereby the orders November 16, 1976 and June 15, 1977 were cancelled. In the said order, it was stated that :

"The government have carefully examined the above representations with reference to the legal position. They consider that the vested seniority rights accrued to individuals by virtue of the rules in force cannot be divested by issuing fresh rules and giving retrospective effect to them. The government have therefore decided not to implement those orders by amending the special Rules governing these non-technical posts."

6. The petitioners as well as some other ECOs/SSRCOs filed writ petitions in the Madras High Court challenging the validity of the said order dated March 3, 1980. The writ petitions were heard by a learned Single Judge of the High Court who allowed the same by his judgment dated December 4, 1984. The learned Single Judge was of the view that under orders dated November 16, 1976, and June 15, 1977, which were passed on the recommendations of the Tamil Nadu Public Service Commission, the petitioners had acquired certain rights in the matter of seniority and promotion and since the impugned government order takes away the said rights of the petitioners, the petitioners should have been afforded an opportunity of a hearing before passing the impugned order which had not been done in this case. Appeals were filed by the State Government as well as by private respondents against the said decision of the learned Single Judge. The said appeals were decided by a Division Bench of the High Court by its judgment dated July 22, 1976, whereby it was held that the provision with regard to fixation of seniority in the cadre of Commercial Tax Officers (CTOs) in which the petitioners were appointed is governed by Rule 35 of the General Rules which are contained in Part II of the Tamil Nadu State and Subordinate Service Rules made under proviso to Article 309 of the Constitution and under the said rule, seniority is to be fixed on the basis of date of appointment to the service. The learned Judges found that the said Rules had not been amended and in the absence of an amendment in Rule 35, the orders with regard to fixation of seniority of ECOs/SSRCOs contained in orders dated November 16, 1976 and June 15, 1977 were invalid and no rights could accrue to the petitioners on the basis of the said orders which may require affording an opportunity to them. With regard to Doctors and Engineers, the learned Judges have pointed out that suitable amendments had been made in the relevant statutory rules relating to both the services. The learned Judges, therefore, while setting aside the order of the learned Single Judge, dismissed the writ petitions of the petitioners but observed that the judgment would not prevent the State Government from amending the Rules made under Article 309 of the Constitution and if and when rules are made and if any persons are affected, they are entitled to challenge the said Rules. Feeling aggrieved by the said decision of the Division Bench of the High Court, the petitioners have approached this Court.

7. The first contention that has been urged by the learned counsel for the petitioners is that the concessions contained in the orders dated November 16, 1976 and June 15, 1977 were not invalid inasmuch as it was permissible for the State Government to issue administrative instructions with regard to determination of the seniority of the ECOs/SSRCOs and by the said orders which were issued on the recommendations of the State Public Service Commission the lacuna which was found in the existing rules was sought to be removed and that it was permissible for the State Government to issue administrative instructions to remove such a lacuna. In support of the said submission, reliance has been placed on the decisions of this Court in *Sant Ram Sharma v. State of Rajasthan* ((1968) 1 SCR 111 : AIR 1967 SC 1910 : (1968) 2 LLJ 830), *Union of India v. H. R. Patankar* (1984 Supp SCC 359 : 1985 SCC (L&S) 19 : (1985) 1 SCR 400) and *State of Gujarat v. Akhilesh*

C. Bhargav ((1987) 4 SCC 482 : 1987 SCC (L&S) 460 : (1987) 3 SCR 1091).

8. In the abovementioned decisions, it has been laid down that although the government cannot amend the statutory rules by administrative instructions, but if the rules are silent on any particular point, the government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed. In the instant case, it cannot be said that on the date of issue of orders dated November 16, 1976 and June 15, 1977, the rules were silent on the matter of fixation of seniority of persons recruited to the Tamil Nadu Commercial Tax Service. Appointment to the said service was governed by General Rules contained in Part II of the Tamil Nadu State and Subordinate Rules. Clauses (a) and (aa) of Rule 35 of the said General Rules provide as under :

"(a) The seniority of a person in a service, class or category or grade shall unless he has been reduced to lower rank as a punishment, be determined by the rank obtained by him in the list of approved candidates drawn up by the Tamil Nadu Public Service Commission or other appointing authority, as the case may be, subject to the rule of reservation where it applies. The date of commencement of his probation shall be the date on which he joins duty irrespective of his seniority,

(aa) The seniority of a person in a service, class or category or grade shall, where the normal method of recruitment to that service, class, category or grade is by more than one method of recruitment, unless the individual has been reduced to a lower rank as a punishment, be determined with reference to the date on which he is appointed to the service, class, category or grade :"

9. This shows that there was an express provision in the statutory rules providing that seniority shall be fixed on the basis of the date of appointment. By orders dated November 16, 1976 and June 15, 1977, the said principle for fixation of seniority contained in Rule 35 was sought to be altered in respect of ECOs/SSRCOs and the seniority was sought to be fixed on the basis of a different criterion, namely, by treating them as belonging to the year in which they would have been appointed to the posts in their first possible attempt after the date of joining military duty. This was inconsistent with the principle for fixing the seniority contained in Rule 35 of the General Rules and this could only be done by suitably amending the said rules and it could not be done by issued administrative instructions. This High Court has, in our opinion, rightly held that the directions contained in orders dated November 16, 1976 and June 15, 1977 were invalid being contrary to the provisions contained in Rule 35 of the General Rules. Since the said orders were invalid, the petitioners could not claim any right on the basis of the said orders and there was, therefor, no question of affording them an opportunity of a hearing before passing the order dated March 3, 1980. Insofar as appointments to medical and engineering services are concerned, the High Court has pointed out that suitable amendments were made in the relevant Service Rules relating to those services whereby the benefit of the Army service was given in the matter of fixation of seniority of ECOs/SSRCOs, who had joined the medical and engineering services. No similar amendment has been made in the rules governing the non-technical services, e.g., Commercial Tax Service to which the petitioners were appointed.

10. The learned counsel for the petitioners have next contended that the petitioners have been subjected to arbitrary discrimination in the matter of fixation of their seniority inasmuch as ECOs/SSRCOs who have joined the medical and engineering services of the Government of Tamil Nadu have been given the benefit of their service in the Army in the matter of fixation of seniority whereas similar benefit has been denied to the petitioners even though the petitioners as well as

other ECOs/SSRCOs who has joined medical and engineering services were all similarly situate. In this connection, reliance has been placed on the decision of this Court in Union of India v. Dr. S. Krishna Murthy ((1989) 4 SCC 689 : 1990 SCC (L&S) 23 : (1989) 11 ATC 892 : 1989 Supp 1 SCR 275). This contention, in our view, is misconceived. ECOs/SSRCOs who have joined medical and engineering services of the State of Tamil Nadu were technically qualified in their fields and they had worked in the Army in the same field in which they are now employed in the State service. The benefit of the experience gained by them during the period of their service in the Army on the posts viz. medical/engineering held by them was available to the State when they joined the medical/engineering services of the State of Tamil Nadu. The same cannot be said for the petitioners because the nature of the duties discharged by them in the Army were different from the duties they are now required to perform as CTOs in the State service. It cannot, therefore, be said that the ECOs/SSRCOs who have joined the medical and engineering services of the State of Tamil Nadu and the petitioners who have joined the Commercial Tax Department of the State are persons similarly situate in the matter of determination of seniority and for counting the earlier Army service for that purpose.

11. In Union of India v. Dr. S. Krishna Murthy case ((1989) 4 SCC 689 : 1990 SCC (L&S) 23 : (1989) 11 ATC 892 : 1989 Supp 1 SCR 275), the ECOs/SSRCOs on discharge from the Army had joined the Indian Forest Service and Indian Police Service and provision was made in the Regulation on Seniority Rules governing these Services whereby it was provided that year of allotment of an officer appointed to the said Service shall be deemed to the year in which he would have been so appointed at his first or second attempt after the date of joining precommission training or the date of their commission where there was only post-commission training. The validity of the said rules was challenged by other direct recruits to those Services on the ground that the ECOs/SSRCOs could not be classified into a separate category. The said contention was rejected by this Court and it was held that ECOs/SSRCOs formed a definite class, distinct from other officers of the Indian Forest Service and Indian Police Service, and that the said classification was founded on an intelligible differential which distinguishes them from other officers and that the classification has rational relation to the objects sought to be achieved by the Rules inasmuch as it has been made for the purpose of compensating the ECOs/SSRCOs for the lost opportunity because of their joining the Army service. The said decision may have a bearing in the event of a rule being framed making provision for giving the benefit of Army service in the matter of fixation of seniority of the petitioners and other persons who have joined the Commercial Tax Service of the State of Tamil Nadu. Since there is no such rule, the petitioners cannot derive any assistance from this decision.

12. In the circumstance, we find no ground to interfere with the decision of the High Court. The appeal as well as the special leave petitions are, therefore, dismissed but with no orders as to costs.

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